FINAL BRIEF **ORAL ARGUMENT JANUARY 25, 2019**

CASE NOS. 18-1124 and 18-1168

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL LONGSHORE & WAREHOUSE UNION,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

and

EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 190; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC,

Intervenor for Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD, CASE 366 N.L.R.B. NO. 76

BRIEF OF INTERVENOR IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Intervenor, East Bay Automotive Machinists Lodge No. 1546; International Association of Machinists and Aerospace Workers District Lodge 190; International Association Of Machinists and Aerospace Workers, AFL-CIO/CLC ("Intervenor"), certifies the following:

A. Parties and Amici

International Longshore & Warehouse Union was a Respondent before the Board in the above-captioned case and is Petitioner/Cross-Respondent in this court proceeding. The Board's General Counsel was a party before the Board. Intervenor was the Charging Party before the Board and is the Intervenor in Support of the Board. Two other entities Ports America Outer Harbor and Marine Terminals Corporation were parties before the Board but settled during the litigation.

B. Rulings Under Review

The case under review is a Decision and Order of the Board issued on May 2, 2018, and reported at 366 N.L.R.B. No. 76 (2018).

C. Related Cases

This case has not previously been before the Court. The Intervenor is not

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aware of any related cases, either pending or about to be presented before this or any other court.

Dated: November 30, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: */s/ David A. Rosenfeld*
David A. Rosenfeld

Attorneys for Intervenor, EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS DISTRICT LODGE 190; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC

CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, Intervenor, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS DISTRICT LODGE 190, EAST BAY AUTOMOTIVE MACHINISTS LODGE NO. 1546, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO/CLC, hereby discloses that it is an unincorporated, voluntary, labor organization established under the National Labor Relations Act, whose purpose is to represent employees in collective bargaining with employers.

Dated: November 30, 2018

Respectfully Submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: */s/ David A. Rosenfeld*
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GLOSSARY

Act or NLRA	National Labor Relations Act
ALJ	Administrative Law Judge
Board or NLRB	National Labor Relations Board
Br.	Opening Brief of International Longshore & Warehouse Union
D&O	Decision and Order, 366 N.L.R.B. No. 76 (May 2, 2018)
General Counsel	Counsel for the Board's General Counsel
GCX	Exhibit introduced by the General Counsel
ILWU	International Longshore & Warehouse Union
Historical Unit	Collective-bargaining unit of M&R employees represented by IAM since the 1960s
IAM	International Association of Machinists and Aerospace Workers District Lodge 190, East Bay Automotive Machinists Lodge No. 1546, International Association of Machinists and Aerospace Workers, AFL-CIO/CLC
JA	Joint Appendix
Longshore contract	Collective bargaining agreement between PMA and ILWU
Machinists contract	Collective bargaining agreement between PMMC and IAM
Mechanics	M&R employees who are members of the historical unit represented by IAM
M&R	Maintenance and Repair

MTCH	MTC Holdings
NLRA	National labor Relations Act, 29 U.S.C. § 151, *et. seq*.
PAOH	Ports America Outer Harbor, and Outer Harbor Terminal, LLC
PCMC	Pacific Crane Maintenance Company, Inc., and Pacific Crane Maintenance Company, LP
PCMC I	*PCMC/Pac. Crane Maint. Co.*, 359 N.L.R.B. 1206 (2013)
PCMC II	*PCMC/Pac. Crane Maint. Co.*, 362 N.L.R.B. No. 120 (June 17, 2015)
PCMC III	*Int'l Longshore & Warehouse Union v. NLRB*, 890 F.3d 1100 (D.C. Cir. 2018)
PMA	Pacific Maritime Association
PMMC	Pacific Marine Maintenance Company, LLC
ULP	Unfair Labor Practice Charge

I. STATEMENT OF JURISDICTION. RELEVANT STATUTORY PROVISIONS, STATEMENT OF ISSUES PRESENTED

Intervenor for Respondent incorporates by reference, the Statement of Jurisdiction, Relevant Statutory Provisions, and the Statement of Issues Presented as contained in the brief of the National Labor Relations Board.

II. STATEMENT OF THE CASE

Intervenor for Respondent incorporates, by reference, the Statement of Jurisdiction, Relevant Statutory Provisions, the Statement of Issues Presented, the Statement of the Case and the Board's Findings of Fact as contained in the Brief of the National Labor Relations Board, but two additional issues presented:

- Whether the ILWU is aggrieved and has standing to challenge the Board's approval of the private non-Board settlement among IAM, PAOH and MTCH?
- Whether the distribution of the settlement funds renders the challenge to that distribution moot?

III. SUMMARY OF ARGUMENT

East Bay Automotive Machinists Lodge No. 1546; International Association of Machinists & Aerospace Workers District Lodge 190; International Association of Machinists and Aerospace Workers, AFL-CIO/CLC joins in the Brief of Respondent National Labor Relations Board.

IAM further responds to some of the laundry list of arguments presented by Petitioner International Longshore & Warehouse Union seeking to relitigate long-decided jurisdictional issues and avoid implementation of a remedy.

ILWU's argument that its due process rights were violated by the ALJ's preclusion of its proffered evidence as to accretion and majority support is

meritless. All evidence that it offered pertained to circumstances that occurred in the midst of unremedied unfair labor practices. Under consistent Board law, such evidence is irrelevant to unit appropriateness.

ILWU's objection to the settlement agreement between IAM and the employer respondents is both procedurally and substantively flawed. ILWU lacks standing to object to the settlement agreement both statutorily and constitutionally. ILWU is a co-respondent, not a party, and is not aggrieved by any aspect of the settlement agreement. Therefore, it lacks standing both under the NLRA and under Article III of the Constitution.

ILWU challenges only the distribution methodology of the settlement, not the amount. The settlement has already been distributed and PAOH has been liquidated. Any argument regarding distribution amounts is moot and should not be considered by this Court.

Substantively, ILWU cannot show that the Board abused its broad discretion in approving the settlement agreement. The agreement was the result of a difficult compromise with a company entering bankruptcy, and the Board correctly concluded that it was a reasonable resolution. The determination of the distribution was based on the historical circumstances of the employees who were harmed by the alleged unfair labor practices and did not discriminate on the basis of union membership.

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I. ARGUMENT

A. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT PAOH WAS A SUCCESSOR TO PCMC AND OBLIGATED TO RECOGNIZE AND BARGAIN WITH IAM

1. The Board Did Not Abuse Its Discretion by Precluding ILWU from Presenting Evidence and Making Arguments Based On Facts and Circumstances which Occurred After Unremedied Unfair Labor Practices

ILWU complains that it was unable to present its case in full because it was precluded from introducing evidence relating to unit appropriateness and accretion into the coastwide bargaining unit. This evidence was simply irrelevant. ILWU merely sought to relitigate issues regarding the appropriateness of the unit and accretion into the coastwide unit that have been conclusively decided by the Board and by this Court. The additional evidence that it sought to introduce pertained to actions occurring following PCMC's 2005 unlawful recognition of ILWU some eight years before the takeover of the work by PAOH. Under consistent Board law, evidence that resulted from unremedied unfair labor practices cannot be considered in determining unit appropriateness.

ILWU's proffered evidence attempted to show that, due to accretion into the ILWU coastwide unit and changes in the unit that resulted in a majority in favor of ILWU, the IAM unit was no longer appropriate. The fundamental flaw in this argument is that *all of the changes that ILWU cites occurred after PCMC's 2005 unlawful recognition*. It was established by the Board in *PCMC I* and affirmed by this Court in *PCMC III* that the unit was appropriate and that PCMC had to recognize the IAM. ILWU's proffered evidence pertained exclusively to the period between 2005 and 2013. (Br. 25-29.)[1] Any changes that occurred in that

[1] ILWU offered no evidence of what occurred after the 2013 recognition of the ILWU, a failure that is fundamentally inconsistent with its positon that what occurred after the 2005 unlawful recognition of the ILWU by PCMC was relevant.

period were a direct result of PCMC's unlawful recognition of ILWU. The Board ignores changes in unit composition that are a result of unremedied unfair labor practices. *Pac. Tel. & Tel. Co.*, 80 N.L.R.B. 107, 112 (1948) ("[W]e would not predicate a unit finding on the Petitioner's experience in collective bargaining because we have found that the Employer extended illegal support to the organization."). Indeed, in *PCMC III* this Court rejected an identical argument made by ILWU:

> We reject the argument that the PMMC M&R employees were merged by accretion into the West Coast-wide ILWU workforce. Moreover, we decline ILWU's invitation to look past March 31 at all for our "community of interest" assessment because any post-March 31 "accretion" necessarily occurred *after* the Employer violated section 8(a)(5) by failing to bargain over its decision to switch operations from PMMC to PCMC. In these circumstances, the Board correctly discounted any evidence tied to "impermissible changes made unilaterally by the employer."

Int'l Longshore & Warehouse Union v. NLRB, 890 F.3d 1100, 1112 (D.C. Cir. 2018) (quoting *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 39 (D.C. Cir. 2015)).

This Court should again reject ILWU's attempt to shoehorn a due process argument into its attempt to relitigate a fully and fairly decided issue which this Court has now approved.

The Board's logic for such a rule disregarding evidence that occurred during the pendency of unremedied unfair labor practices is irrefutable. Unfair labor practices may not be remedied until years after they occur because of employer or union resistance and litigation. In the meantime, the work continues. The company keeps operating. In the context of an unlawful recognition, every worker who is hired must become a member of the unlawfully supported union. As the time period of the unremedied ULPs continues to extend, workers may no longer

remember the context that led to the charges. Workers may leave. Many may simply be unaware of the pending ULPs or the Board's processes. Such a context is an ideal situation for an employer or a union seeking to avoid liability for unfair labor practices to take advantage of the unfair labor practices previously committed. Once enough time has passed, workers may simply consider themselves members of the unlawfully assisted union and members of a larger bargaining unit, even if, under the status quo ante, they should still be considered members of the original unit. If the Board were to consider such developments that occur in the context of unremedied ULPs, it may find an accretion. As a result, the unit would no longer be appropriate and the original ULP would forever go unremedied. The Board's policy of disregarding unit changes that occur in the context of unremedied unfair labor practices is a rational and important way for the Board to protect its remedial authority. Otherwise, wrongdoers would take advantage of misconduct to avoid a remedy for their initial violations of the Act.

ILWU presents an identical argument that it now has the uncoerced support of the majority of the bargaining unit members. But this argument encounters the same flaw as discussed above. Any "uncoerced" majority support occurred in the context of PCMC's unlawful recognition of ILWU and must be disregarded.

2. The Board Correctly Determined That PCMC's Unfair Labor Practices Continued to Affect Unit Appropriateness at PAOH

ILWU argues that the Board should not have precluded it from presenting evidence regarding unit appropriateness at the time PAOH took over the M&R work because PAOH was not responsible for PCMC's unlawful recognition of ILWU.[2] (Br. 35-37.) ILWU argues that this effectively "imputes" PCMC's ULPs to PAOH. This argument is fundamentally flawed. ILWU was found to have

[2] Since PAOH hired the stevedoring employees and other employees directly without an intervening subcontractor there are no issues concerning its continued recognition of the ILWU in those separate units.

unlawfully accepted recognition from PCMC. ILWU continued to unlawfully accept recognition throughout the litigation of that case, losing at each stage of the proceedings: *PCMC I*, *PCMC II*, and *PCMC III*. ILWU's acceptance of recognition tainted any potential evidence of unit appropriateness and majority status and precluded the Board from considering such evidence. ILWU itself therefore holds responsibility for continuing the unremedied unfair labor practices that led to the preclusion of post-2005 evidence.

Further, as discussed in detail in the Brief of the National Labor Relations Board, there is no doubt that PAOH was a successor employer to PCMC obligated to recognize and bargain with IAM, the lawful exclusive representative of PCMC's employees.

B. THE BOARD DID NOT ABUSE ITS DISCRETION IN APPROVING THE SETTLEMENT AGREEMENT

1. ILWU Lacks Standing to Challenge the Settlement Agreement and it is Not a Person Aggrieved within the Meaning of the Act

ILWU lacks standing to pursue its purported challenge to the settlement agreement between the IAM and PAOH.[3] ILWU must establish both that it is a person aggrieved within the meaning of 29 U.S.C. § 160(f) and that it has constitutional standing under Article III. *See Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982) (to be "aggrieved" under section 10(f), a party must demonstrate a loss or injury in fact from the Board's order); *United States v. Fed. Mar. Comm'n*, 694 F.2d 793, 800 n.25 (D.C. Cir. 1982) (the petitioner for review "still must meet judicial standing

[3] The Board declined to reach the argument that ILWU lacked standing to challenge the settlement, instead granting permission to specially appeal and denying the appeal on the merits. (JA 1712.) Although the Board "assume[d], without deciding, that ILWU has standing to file a request for permission to appeal," this Court must face the statutory and constitutional issue.

requirements"); *Noel Canning v. NLRB*, 705 F.3d 490, 514 (D.C. Cir. 2013) ("[L]itigants seeking to intervene in cases involving direct review of administrative actions must establish Article III standing."), *affirmed, NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

The ALJ, in approving the settlement agreement, noted that "[t]he ILWU's objections, in general, involve matters such as pension reimbursement and employee backpay which do not impinge [sic] the ILWU. The single matter which will have an effect on the ILWU is whether further litigation of this case can take place if the settlement is approved." (JA 387 at n.18.) The settlement agreement had no impact on ILWU's ability to fairly present its case, as indicated by the extensive proceedings underlying this petition for review. ILWU suffered no harm in any respect from the execution or performance of the agreement.[4]

ILWU, in its brief, argues that the historical unit has accreted into the ILWU coastwide unit because PAOH is defunct, and the mechanics at issue have largely moved into other ILWU-represented jobs. (Br. 47-48.) This is a red herring. Whatever relationship the ILWU may have with the mechanics at present, their continued representation of them from 2005 to 2016 has been found to be unlawful. The Board ordered ILWU to cease and desist from accepting assistance and recognition as exclusive bargaining representative with respect to the PAOH

[4] ILWU may suggest in a Reply that it is aggrieved because it represents the employees who worked for PAOH who received nothing from the settlement. It is true that there were ILWU members who were hired by PAOH through its dispatch procedure on a casual or permanent basis. For reasons explained in this Brief and found by the ALJ, they were excluded from the settlement since they lost nothing. In any case, ILWU does not represent them while working for PAOH in the unit, so it has no standing as an aggrieved party or constitutional Article III standing to represent employees who are in a bargaining unit represented by the IAM. Such an argument would violate the bedrock principle of the Act that only one union can be the exclusive representative of a bargaining unit. 29 U.S.C. § 159 (a); Robert Gorman & Matthew Finkin, *Labor Law Analysis and Advocacy* § 5.1 (2013).

unit during the time it lacked uncoerced majority support, and to decline recognition within that unit in the absence of a Board certification. (JA 1742-1743.) In other words, as a matter of law, ILWU never represented the PAOH unit during the period in question from 2013 until PAOH closed. ILWU should not be permitted to bootstrap its unlawful recognition into standing to challenge a settlement agreement to which it is not a party.

ILWU's proffered authority in support of its standing to challenge a settlement agreement is inapposite.[5] In *Retail Clerks Union 1059 v. NLRB*, 348 F.2d 369 (D.C. Cir. 1965), this Court found that a union had standing to present a challenge before the Board to a *Board order* entered pursuant to a settlement agreement despite the union not being party to the proceedings. This Court in *Retail Clerks Union* was concerned of the imprimatur of the Board on an order "requir[ing] the employer to cease and desist from rendering 'unlawful assistance' to petitioner, one of two unions which had been vying for representation of its employees. By specifically naming petitioner, the Board in effect branded it a 'sweetheart union,' and thus impaired its organizational abilities." *Id.* at 370. No such concern is present here justifying granting standing to a non-party to a settlement agreement. The settlement at issue is a private, non-Board settlement between PAOH, MTCH and IAM. It contains no provision for the entry of a Board order, and none issued as a result of the settlement agreement. Any harm that ILWU may have suffered comes exclusively as a result of the Board's findings of fact and remedies issued following a vigorously contested hearing against it. It does not arise from the settlement with PAOH and MTCH.

[5] ILWU cites in support of its argument for standing *Oil, Chemical & Atomic Workers Local Union No. 6-418 v. NLRB*, 694 F.2d 1289. That case addressed an entirely different issue: a union's ability to petition for review of a Board decision where it was the charging party and had obtained most, but not all, of the relief it sought. The case mentions nothing about settlement agreements and challenges thereto and has no relevance to this proceeding.

ILWU, of course, has the right to challenge those substantive findings in its petition for review and has done so. But it has suffered no harm as a result of the settlement agreement and is not a "person aggrieved" pursuant to 29 U.S.C. §160(f) with respect to its challenge to the settlement agreement, nor does it have Article III standing.

2. The Board Was Well Within Its Discretion In Approving the Settlement On the Merits

"The Board has long had a policy of encouraging the peaceful, nonlitigious resolution of labor disputes." *McKenzie-Willamette Reg'l Med. Ctr. Assocs., LLC*, 361 N.L.R.B. 54, 55 (2014) (quoting *Independent Stave Co.*, 287 N.L.R.B. 740, 741 (1987)). "The purpose of such attempted settlements has been to end labor disputes, and so far as possible to extinguish all the elements giving rise to them." *Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944). Accordingly, upon a motion of one or both of the parties to defer to a settlement agreement in lieu of further proceedings upon a complaint, the Board, after considering any objection raised by the General Counsel, will determine in its own discretion, "'whether under the circumstances of the case, it will effectuate the purposes and policies of the Act to give effect to any waiver or settlement of charges of unfair labor practices.'" *Independent Stave*, 287 N.L.R.B. at 741 (quoting *Nat'l Biscuit Co.*, 83 N.L.R.B. 79, 80 (1949)). The Board acknowledges, in evaluating the appropriateness of settlement agreements, that litigation is uncertain, and settlement necessarily requires compromises in which neither side achieves the entire remedy it seeks. 287 N.L.R.B. at 742. Accordingly, the Board does not require settlement agreements to "mirror a full remedy," but takes a broader approach in evaluating the reasonableness of a settlement. ILWU agrees that the *Independent Stave* analysis applies. *See also UPMC*, 365 N.L.R.B. No. 153 (Dec. 11, 2017) (reaffirming vitality of *Independent Stave* analysis).

In *Independent Stave*, the Board established four criteria by which it determines whether a settlement will "effectuate the purposes and policies of the Act":

> 1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

287 N.L.R.B. at 743. The positions of the General Counsel and the Charging Party are particularly weighty factors in evaluating a settlement. *Beverly Cal. Corp. v. NLRB*, 253 F.3d 291, 295 (7th Cir. 2001). The list of factors is non-exclusive, and the Board will examine all the circumstances in determining whether a settlement agreement effectuates the purposes and policies of the Act.

In reviewing a settlement agreement reached at any point in a Board investigation prior to a final judgment enforced by a court of appeals, the only question before the court is "whether the Board's action is within the broad discretion the Board may exercise in the settlement of unfair labor practice cases." *Textile Workers Union v. NLRB*, 315 F.2d 41, 42 (D.C. Cir. 1963).

Petitioner's argument that the "substantial evidence" standard applied to substantive Board findings should be applied in evaluating the settlement agreement is inapposite. (Br. 39.) In *Dupuy v. NLRB*, 806 F.3d 556, 562 (D.C. Cir. 2015, this Court noted that, where the settlement "arose prior to a federal court judgment enforcing the Board Order," settlement is within the broad discretion of the General Counsel and subject to review under the multi-factor analysis

established in *Independent Stave*, 287 N.L.R.B. at 741.). In *Dupuy*, the settlement arose following a federal court's enforcement of a Board order, and in settling post-enforcement, the Board "is 'not at liberty to modify an Order that has been enforced by a court of appeals[.]'"). *Id* at 562 (quoting *D.L. Baker, Inc.*, 351 N.L.R.B. 515, 525 n.31 (2007)).[6] *Dupuy* has no applicability to a non-Board settlement entered into prior to an order of the NLRB being enforced by a court of appeals.

While ILWU makes a range of arguments attacking the appropriateness of the settlement agreement, all ultimately fail to establish that the Board departed from its broad discretion in approving settlements of unfair labor practice charges. In this regard, it takes a directly inconsistent positon. It argues that no remedy was warranted at all because its conduct and the conduct of PAOH was entirely lawful. It does not contest the amount of the settlement, it contests only the distribution of the settlement, which was approved by the General Counsel, the ALJ, and the Board.

The hearing in this matter commenced on October 12, 2015. (Reconsideration motion at 2.) In March 2016, PAOH ceased operations and commenced Chapter 11 bankruptcy proceedings. (JA 1741 at n.11.) The General Counsel then obtained permission to file an amended consolidated complaint, adding an alternative theory of liability alleging that a different terminal services company, MTCH, was a single employer with PAOH. While the hearing was ongoing, and after the bankruptcy filing, IAM, PAOH, and MTCH entered into the

[6] Petitioner's other purported support for its argument for a higher standard of review was issued before *Independent Stave* and thus analyzes the settlement agreement under a more stringent standard no longer applied by the Board or the courts. *See Oil, Chem. & Atomic Workers Int'l Union v. NLRB*, 806 F.2d 269, 272 (D.C. Cir. 1986) (citing *Clear Haven Nursing Home*, 236 N.L.R.B. 853 (1978)). *Clear Haven* was expressly overruled by the Board in *Independent Stave*. 287 N.L.R.B. at 742. *See also UPMC*, 365 NLRB No. 153 (reaffirming vitality of *Independent Stave* analysis).

settlement agreement resolving most claims between them. The settlement provided for a $3 million lump sum payment to IAM, to be distributed as follows: approximately one-third ($943,121.05) to IAM's health and pension funds to compensate for lost benefit contributions, nearly two-thirds ($1,904,999.90) to be distributed to individual employees who suffered harm as a result of PAOH's unlawful recognition of ILWU, and approximately five percent ($151,871.05) to reimburse IAM's legal fees incurred in this protracted and complex litigation. (JA 383-384, 396.) In response to inquiry from the General Counsel, IAM proposed a detailed distribution plan detailing the levels of compensation to be distributed to each discriminatee.

ILWU objected to the settlement agreement, and the General Counsel approved of the settlement terms save a limited objection to the allocation of attorney fees. The ALJ ordered additional briefing on the attorney fees issue and ultimately approved the settlement in all respects. (JA 369.) The ALJ engaged in a detailed analysis of the settlement agreement, ultimately concluding that it met each of the *Independent Stave* criteria and approving the settlement. (JA 381-387.)

As to the first prong of the *Independent Stave* test, the ALJ noted that the charging party, IAM, and respondents PAOH and MTCH had agreed to be bound. The ALJ found, further, that the General Counsel largely supported the settlement. The General Counsel approved the payment to the pension funds and the distributions to the individual discriminatees. The General Counsel did object to the portion of the settlement dedicated to attorney fees, but approved the vast majority of the settlement and planned distributions. ILWU, a non-party to the

settlement, did object to the settlement as repugnant to the Act.[7] With respect to the second prong, the judge noted that the hearing was ongoing at a relatively early stage, that there remained risk that IAM would not ultimately prevail, and perhaps most importantly, that PAOH was entering bankruptcy. (JA 386.) Given these factors, the judge found that the settlement was "quite reasonable under all of the circumstances." (JA 386.) With respect to the attorney fees issue, the judge noted that there appears to be no Board law either prohibiting or endorsing inclusion of attorney fees in a non-Board settlement agreement, but concluded that the fees appropriate because they were adequately documented, represented a small part of the settlement, and constituted a reasonable compromise "resulting from the give and take of negotiation." (JA 387.)[8]

ILWU's challenges to the settlement agreement are meritless. ILWU does not challenge the total amount of the settlement – only the distributions. The distributions have already been made. PAOH has been liquidated. ILWU's objections to the distribution methodology are moot and need not be considered by this Court.

ILWU's challenges to the settlement agreement are meritless. ILWU first objects that on the face of the agreement, there is no provision specifying how the settlement money is to be distributed. This specious argument should be rejected

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[7] ILWU objected to the reimbursement methodology and employee backpay, issues that the judge found were irrelevant to it. This is the standing and aggrievement issue discussed above. ILWU also objected to the practicality of continuing the proceeding without the participation of PAOH. The judge rejected that argument, and the fact that this case has proceeded through hearing and final Board decision shows that there was no impediment to continued prosecution of the matter.

[8] While this Court has held that the Board lacks authority to *order* a party to pay attorney fees, *see HTH Corp. v. NLRB*, 823 F.3d 668, 680 (D.C. Cir. 2016), the Board's statutory authority is not implicated by a voluntary agreement between the charging party and the respondents to resolve a disputed claim.

outright. ILWU cites no law in support of its argument that a lump sum payment is inappropriate. Nonetheless, IAM submitted a detailed distribution schedule identifying payments to each discriminatee, and that schedule was part of the record before the ALJ in approving the settlement. (JA 383-384.) Indeed, ILWU presents a detailed challenge to that distribution schedule. (Br. 44-47.) The fact that the settlement agreement itself does not contain the detailed distribution schedule approved by the ALJ and implemented by the parties is simply irrelevant.

Next, ILWU attempts to challenge the distribution schedule on the grounds that it discriminates among bargaining unit members in violation of section 8(b)(1)(A) of the Act, 29 U.S.C. § 158(b)(1)(A), by not providing payments to bargaining unit members who were members of ILWU when it unlawfully accepted recognition in 2013. As the Brief of the National Labor Relations Board discusses in detail, this challenge is waived due to ILWU's failure to raise it at any point during the proceedings seeking approval of the settlement. (NLRB Br. 46-47.) ILWU raised numerous objections to the settlement but never once raised an objection concerning exclusion of certain bargaining unit members from the distribution plan, even in multiple rounds of supplemental briefing and a special appeal before the Board. This Court lacks jurisdiction to consider any argument or objection not raised before the Board. 29 U.S.C. § 160(e); *CC1 Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018).[9]

Furthermore, ILWU's argument fails on the merits. The distribution schedule was based on an approximation of how much each bargaining unit member was harmed. When PCMC unlawfully recognized ILWU in 2005, it imposed the Longshore contract to determine the terms and conditions of

[9] The provisions of section 10(e) can be waived in the presence of "extraordinary circumstances." ILWU makes no argument that such circumstances are present here.

employment of its mechanics. This contract obviously had different terms and conditions than the contract that had been bargained by IAM under which IAM members worked prior to 2005. (*See* JA 267-289.) Indeed, the Board found in *PCMC I* that the initial unlawful recognition of IAM stemmed from Maersk's dissatisfaction with the labor cost of IAM mechanics. 359 N.L.R.B. at 1207. Bargaining unit members who were already members of ILWU prior to 2005 already worked under the Longshore contract. Thus, they suffered no harm from the imposition of that contract or from working under it. In contrast, the IAM mechanics lost the benefits of the contract they bargained for, especially loss of pensions and certain elements of compensation.[10] ILWU members simply did not suffer harm from the unlawful recognition, and it is both rational and non-discriminatory to compensate only those bargaining unit members who suffered harm as a result of the unfair labor practices.[11]

ILWU argues that the receipt of differing amount of settlement funds by three separate groups of bargaining unit is irrational. (Br. 44-47.) Calling them "tranches," ILWU, however, concedes the important point that the distribution was based roughly "on work history." (Br. 44.) These issues were thoroughly reviewed by the ALJ on reconsideration, and ILWU's challenges were all denied on the merits. (JA 416.) ILWU focuses on the fact that one employee was on disability at some point. (Br. 45.) But, since his back pay award is only a small

[10] Some of the ILWU benefits were comparable, but there were losses, particularly in that members lost participation in the IAM pension even though they started again under a new pension plan.

[11] ILWU cites *Dist. 65, Distributive Workers*, 214 N.L.R.B. 1059 (1974), in support of its argument that the settlement distribution violates section 8(b)(1)(A). In that case, however, the Board sought reinstatement and backpay for an entire bargaining unit due to a facility closure. The Union then distributed settlement funds only to those who had participated in picketing and strike activities. There, however, *all employees suffered harm*. All employees were entitled to some form of compensation. Here, the ILWU members lost nothing.

portion of his loss and ILWU has not established how long he was on disability, there is no showing of irrationality in giving him the same amount as others who may have also been unavailable for work at various points. Additionally, those who receive the minimal amount of $5,000 suffered some loss depending on when they retired. Given the complexities and difficulties inherent in estimating back pay for individuals over such a long period of time, the three "tranches" were entirely reasonable.

IAM submitted a letter detailing its plan for distributing settlement funds that provided a detailed rationale for each employee and category of payment. The General Counsel reviewed that letter and expressed his approval of the settlement terms with one exception noted below. The ALJ and the Board both approved the distribution plan as rational. ILWU challenges that there was insufficient evidence to establish the full backpay potential. However, there is simply no requirement in the *Independent Stave* analysis that the Board calculate the exact backpay that it might be able to collect if the case proceeded to final order. Under *Independent Stave*, the Board must evaluate the reasonableness of the settlement in light of the risk of continued litigation. It did so here. If the Board was required to issue a backpay specification in conjunction with evaluating the reasonableness of a settlement, the efficiency of the settlement process would simply collapse.

The Board retains broad discretion to approve a settlement agreement based on the *Independent Stave* factors. Here, it did more than enough to ensure that the

settlement was fair and reasonable.[12] ILWU's detailed challenges to the status of specific individuals were addressed by the ALJ and found to be baseless. Settlement is inherently imprecise. It relies upon an estimate of what might happen potentially years in the future. The fact that a few individuals have circumstances slightly different from other individuals and yet receive the same payout is inherent in any settlement. ILWU makes unsubstantiated claims about payments being for political or other undisclosed reasons. Its rank speculation, without any evidence of improper reasons for distribution in the record, should be ignored. ILWU's baseless accusations of favoritism simply ignore the widespread unfair labor practices that harmed IAM mechanics for over a decade. It ignores that the ILWU members were not harmed because they got exactly what their union negotiated under the terms of the Longshore contract. In fact, they got more than they were entitled to since they got jobs that would have gone to IAM represented employees under the terms of a different contract.[13]

Critical to the ALJ's approval of the settlement was that PAOH had entered bankruptcy. (JA 386.) There was a real chance that discriminatees would receive

[12] ILWU further argues that the Board should have either made backpay calculations or documented in the file why they were not necessary, pursuant to guidance from the NLRB Casehandling Manual, Part 1, § 10124. However, "the Casehandling Manual does not bind the Board; it is intended merely to provide guidance to the Board's staff." *Sitka Sound Seafoods, Inc. v. NLRB*, 206 F.3d 1175, 1182 (D.C. Cir. 2000). The issue is not whether the Board followed the Casehandling Manual but whether its decision was within its broad discretion. Nor does this provision directly apply to a non-Board settlement, although the record does document the reasons for the settlement and the distribution of the settlement.

[13] ILWU is essentially arguing that its members should get additional compensation, including additional benefits from the IAM pension, something they were not entitled to under the ILWU's theory of the case. The additional pension would cause unreasonable benefit expense and liability to the IAM plan for benefits that were not paid for by PAOH.

nothing once PAOH was liquidated.[14] This context must be kept in mind in evaluating the reasonableness of the settlement. It does not provide full compensation for the alleged unfair labor practices – nowhere close. But it achieves a positive result for a number of workers who would likely otherwise have never received a dime from their former employer in compensation for its unfair labor practices. At the least, any payment would have been substantially delayed.

Finally, ILWU objects to the inclusion of attorney fees as a portion of the settlement proceeds. The attorney fees portion of the settlement constitutes approximately five percent of the total settlement amount. As the ALJ noted, this was a reasonable provision produced during the give-and-take of negotiations.[15] Had IAM been forced to litigate against PAOH in bankruptcy, it would have incurred substantially greater attorney fees. The Board was not a party to the settlement. ILWU points to no authority indicating that parties cannot agree to pay attorney fees in a non-Board settlement. The Board did not abuse its discretion in declining to reject a comprehensive settlement involving a company in bankruptcy

[14] In October of 2017, the Chapter 11 proceedings were converted to a Chapter 7 liquidation. *See* Order Converting Case, ECF No. 894, *In re Outer Harbor Terminal, LLC*, No. 16-10283 (Bankr. D. Del. Oct. 13, 2017). It is unlikely that any funds remain for distribution. For the sake of comparison, the City of Oakland settled a $4.2 million tax claim against PAOH, $3.2 million of which had statutory priority in bankruptcy, for $850,000. *See* Order Approving Settlement Agreement, ECF No. 430, *In re Outer Harbor Terminal, LLC*, No. 16-10283 (Bankr. D. Del. Nov. 7, 2016).

[15] The ALJ noted that while the letter submitted by IAM mentioned lost dues in the context of the attorney fee provision, the settlement does not in any way account for dues lost by IAM. (JA 384.) The attorney fee provision is independent.

where it provided for a relatively modest payment of attorney fees as part of a total agreement.[16]

VI. CONCLUSION

For the reasons discussed in the Brief for the National Labor Relations Board and for the reasons discussed in this Brief, the Board's Decision and Order should be enforced in full.

Dated: November 30, 2018

Respectfully Submitted,

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[16] The settlement also involved another entity, MTCH, which was not involved the bankruptcy proceeding. ILWU does not argue that that the case against MTCH as a single employer was so strong that the settlement was a sellout of the unit members. Rather, it maintains its position that there was no viable case against PAOH and MTCH. This position underscores the value of the settlement of a reasonably large payment to workers in a case that ILWU argues is meritless.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32 and Circuit Rule 32(e)(2), Intervenor certifies that Brief of Intervenor East Bay Automotive Machinists Lodge No. 1546; International Association of Machinists and Aerospace Workers District Lodge 190; International Association of Machinists and Aerospace Workers, AFL-CIO/CLC contains 5,775 words of proportionately spaced, 14 point type, and that the work processing system used was Microsoft Word 2010.

Dated: November 30, 2018

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on November 30, 2018, I electronically filed the foregoing **FINAL BRIEF OF INTERVENOR IN SUPPORT OF RESPONDENT/CROSS-PETITIONER** with the United States Court of Appeals, District of Columbia Circuit, by using the Court's CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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I certify under penalty of perjury that the above is true and correct.

Executed at Alameda, California, on November 30, 2018.

/s/ Karen Kempler
Karen Kempler

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